Filed 2/15/11 In re R.W. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re R. W. et al., Persons Coming Under the Juvenile Court Law.	
SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L. W., Defendant and Appellant.	C065619 (Super. Ct. No. J04610)

Appellant L.W., the mother of the minors D.T., E.W., and R.W., appeals the juvenile court's order terminating her parental rights as to E.W. and R.W. and denying her petition for modification as to all three minors. (Welf. & Inst. Code, §§ 366.26, 388, 395; further section references are to the Welfare and Institutions Code.) She contends it was an abuse of discretion for the juvenile court to deny her petition for

modification (§ 388) seeking the minors' return, and the juvenile court should have applied the parent-child bond and sibling relation exceptions to adoption. We shall affirm the juvenile court's orders.

BACKGROUND

In May 2007, appellant was living with her three children, D.T., R.W., and E.W., and two roommates, Michael and his girlfriend S.J. The minors were placed in protective custody after a medical exam showed numerous healing scars on R.W., and further investigation determined Michael physically abused all of the minors.

The minors were interviewed at a homeless shelter. D.T. came up to a social worker and said, "Michael did this to my brother." He then removed R.W.'s shirt, exposing belt welts all over R.W.'s back, and said Michael hit his brother with a belt. D.T. told the social worker, "look at this," and revealed skin peeling off of R.W.'s toes, caused by Michael burning them with hot wax and cigarettes. D.T. said Michael hit him with a belt, and burned E.W. with a cigarette. The minors were abused when appellant was not at home; D.T. told appellant, but she did nothing.

Appellant told the social worker she was having a hard time paying for her car and making rent, so she spoke to her brother about the problem and he introduced her to Michael. Appellant left the minors with Michael while she looked for a job. She saw bruises on her children over a month ago, but continued to leave them with Michael.

On May 15, 2007, the San Joaquin County Human Services Agency (HSA) filed a dependency petition alleging jurisdiction over the minors pursuant to section 300, subdivisions (b), (failure to protect), (e) (severe physical abuse), (i) (cruelty), and (j) (abuse of sibling). Appellant did not contest the allegations, and the juvenile court sustained the petition in August 2007.

The minors were continued in foster care at the October 2007 disposition hearing. Appellant's case plan included anger management, parenting classes, and obtaining suitable housing. The minors were first placed in the same foster home, but inappropriate behavior between D.T. and R.W. led to D.T. being placed in a different foster home.

A January 2008 report noted appellant attended all but one of her parenting classes, receiving excellent references from the instructor, and completed half of her anger management classes. An October 2007 visit ended early after appellant failed to intercede in a fight between D.T. and R.W., and made inappropriate comments to the minors. Appellant appeared to be very motivated and receptive to services. She was residing with her mother and grandmother in Stockton.

HSA issued another report in May 2008. Appellant had a new husband, W.J., whom she met at a Salvation Army homeless shelter. W.J. had an extensive criminal record, including three serious felony convictions, along with convictions for domestic violence and controlled substance offenses.

Appellant left W.J. in November 2007 after experiencing problems with him, but then returned after having difficulties with her mother. Appellant reported she was again living with W.J. in December 2007.

Appellant's visits were inconsistent. She placed unreasonable expectations on D.T. regarding his bed wetting, and punished E.W.'s misbehavior by telling the two-year-old he would be placed on timeout for the entirety of the next visit.

The reporting social worker noted appellant's inability to put in practice what she learned in parenting classes. Appellant was referred to parent-child interactive therapy (PCIT) with D.T. to remedy this problem. The social worker also expressed concerns about appellant's mental health and impulsive behavior.

A July 2008 report related that since the dependency, appellant had lived in at least seven different residences, none suitable for the minors. She continued to be impulsive; her actions were based on her needs rather than the needs of her children. Although appellant completed her initial case plan, she had not started PCIT, and failed to acknowledge her role in exposing the minors to severe physical abuse. She also indicated all three of the minors were conceived by sexual assaults. HSA recommended a psychological evaluation for appellant to address these concerns.

Appellant gave birth to another child, A.J., in May 2008. W.J. was the father. In June 2008, D.T. told a social worker he

did not want to go home with appellant. HSA recommended terminating services with a permanent plan of adoption.

In an August 2008 contested hearing, the juvenile court continued services to the 18-month reunification date because appellant had insufficient time to complete her PCIT.

HSA again recommended terminating services in a November 2008 report. The report related that appellant briefly moved into her own apartment in September 2008 following an alleged domestic violence incident with W.J., but returned to her husband the following month. In October 2008, appellant told the social worker she no longer wanted to reunify with the minors, and desired her case to be closed.

Appellant lived in Sacramento County, where a dependency action was initiated for A.J. after the domestic violence incident with W.J. Appellant indicated she was going to divorce W.J., but talked to her husband for hours on the telephone. She had not attended PCIT.

Appellant was examined by a psychologist in January 2009, who concluded she possessed borderline cognitive ability. Appellant's bond with the minors was "rather underdeveloped and weak." There was "a tendency to role reversal in which the children are expected to be, and perceived as a source of nurturance, guidance and love towards" appellant.

The psychologist found there was a strong possibility appellant suffered from Post Traumatic Stress Disorder (PTSD), along with an unknown substance abuse disorder, as well as schizoid personality disorder. It was the psychologist's

opinion "that, at this time, the reunification of this mother with her children is premature and highly prone to pose risks to the development and wellbeing of the minors."

In March 2009, HSA reported appellant was self medicating with controlled substances, resulting in a reported suicide attempt. She presented with slurred speech, and overall erratic behavior. Appellant required residential drug treatment, which indicated chronic substance abuse. She said W.J. was the father of the minors, and conceived each of them by raping her.

Appellant filed a petition for modification (§ 388) in April 2009, requesting the minors' return. As changed circumstances, she alleged her completion of most services and active participation in the remainder. The juvenile court denied the petition in the same month.

On April 29, 2009, the juvenile court terminated reunification services and set a selection and implementation hearing.

HSA submitted a section 366.26 report in August 2009. D.T. resided in his current foster home since April 2008, but the caretaker had no intention of adopting. He was diagnosed with ADHD as well as having only one kidney. R.W. and E.W. were in the same home since June 2008; they adjusted well and the caretaker wanted to adopt them. All three minors were considered adoptable.

Appellant's visits remained inconsistent, and the minors did not expect visits. At times she requested weekly visits, but stopped visiting other times, waiting more than a month

before requesting another visit. Her conduct during visits demonstrated she did not engage with the minors in an age appropriate manner, and did not assume a parental role.

Appellant filed a second petition for modification in November 2009, asking for the minors' return with family maintenance. She alleged that she completed numerous programs, including: substance abuse treatment, a 13-week anger management program, a 15-week domestic violence program, dependency drug court, parenting classes, a three-day intensive group counseling for PTSD and substance abuse, and counseling related to neglect of her children, anger management, substance abuse, and other issues. She was living in a transitional sober living environment where she could stay for two years. A three bedroom apartment was available if the minors were returned to her care. Also, Sacramento County returned A.J. to her care.

A February 2010 report related continued problems with appellant's visits. During a December 2009 visit, E.W. slapped appellant in the face, in turn, a visibly upset appellant picked E.W. up and forcibly sat him down on the couch. The minors visited each other and their half-sibling A.J. on appellant's twice monthly visits. The minors appeared to have a close bond with each other.

The minors were asked where they would like to live. D.T.'s choices were, in order of preference: 1) his foster father; 2) his school teacher; 3) his two brothers; 4) appellant; and 5) his grandmother. R.W. wanted to live with his caretaker, E.W., and his foster brother. He did not want to

live with appellant because she used to give him whippings and slap him. E.W. wanted to live with his caretaker, his brothers and foster brother at the placement, along with someone to be his father. He did not wish to live with appellant.

Appellant moved to a one-year transitional home in Sacramento in October 2009, with a pending application to a two-year transitional program in Sacramento. The supervisor of the two-year home said residents had to be working or in the work program for eight hours a day, and they had to find their own day care.

At a contested hearing on the second modification petition, appellant testified that her Sacramento dependency case was dismissed in October 2009, and she had full custody of her daughter. She lived with her daughter in transitional housing from Volunteers of America. The housing provided support from other mothers for her recovery; they attend AA/NA meetings, have relapse prevention, and learn life skills. She had no contact with W.J. since January 2009, has a no contact order against him, and wants nothing to do with the man. Appellant admitted she did not participate in the PCIT portion of her case plan.

The juvenile court denied the petition in May 2010, finding evidence of changed circumstances, but appellant presented no evidence showing the petition was in the minors' best interests.

The selection and implementation hearing was held in May 2010. HSA advocated termination of parental rights for E.W. and R.W. While maintaining D.T. was adoptable, HSA did not ask for appellant's parental rights to be terminated as to him, since

the agency had not found an adoptable home for D.T. Appellant's counsel argued the beneficial parent relationship and sibling bond exceptions to adoption applied to E.W. and R.W., and asked for a 90-day continuance for D.T. The juvenile court terminated parental rights regarding E.W. and R.W., and ordered a 120-day continuance for D.T.

DISCUSSION

I

Appellant contends the juvenile court abused its discretion in denying her second petition for modification because the evidence established both a change in circumstances and the proposed modification was in the minors' best interests.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances. "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is a preponderance of the evidence. [Citation.]" (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*Id.* at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parents' interests in

reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Assuming the juvenile court correctly concluded appellant adequately demonstrated changed circumstances, we agree with the juvenile court that she did not show the proposed order was in the minors' best interests.

The problems leading to the dependency were profound; appellant placed the minors with grossly inappropriate caretakers, resulting in their being subject to repeated physical abuse. Her problems with the minors persisted throughout the lengthy dependency.

Appellant points out she has completed numerous classes, engaged in substance abuse treatment and therapy, and found better housing. However, appellant never demonstrated an ability to apply what she learned. Appellant's visits were inconsistent and plagued by inappropriate behavior. As recently as December 2009, more than two years after the dependency began, appellant continued to behave inappropriately during visits.

This problem was identified in December 2007. The proposed solution, PCIT, was offered to appellant throughout the dependency, but she never availed herself of the opportunity.

Appellant argues it is unfair and irrational to continue removal of the minors when Sacramento County returned custody of her daughter A.J. and terminated that dependency. The juvenile court was only presented with the bare fact that A.J. had been returned to appellant and the dependency ended. The relevant

reports from the Sacramento County Department of Health and Human Services, records of hearings, and the juvenile court's orders in the matter were not before the juvenile court and are absent from the record. Appellant cannot satisfy her burden of proof by asking the juvenile court or this court to speculate as to why A.J. was returned to her care.

Even if A.J.'s return was appropriate, it does not mean that the minors could be safely returned to appellant. Unlike the minors, A.J. was detained shortly after her birth; appellant never exposed her to prolonged physical abuse at the hands of another, as she did to the minors. Also, the reason for A.J.'s removal, domestic violence between appellant and her husband, is less threatening than the severe physical abuse which led to the minors' removal.

While appellant presented evidence of changed circumstances, she presented the juvenile court with no evidence showing that returning the minors to her care is in their best interests. On appeal, she claims granting the petition will be in the minors' best interests because she "offers her children a living example that a human being can rise above great adversity and can access help to become a healthy and functional human being," making her a "living example" which "strongly promotes the children's best interests."

Not so. The minors, exposed to prolonged physical abuse under her care, and exposed to poor behavior on her part throughout the dependency, do not want to live with her. Two of the minors are ready to be adopted by a foster parent with whom

they have bonded. The third minor, D.T., was not yet placed for adoption at the time of appellant's petition, but was still considered adoptable and showed little interest in returning to appellant. Appellant's home is better than when the minors were removed, but it is temporary and lacks child care, placing the minors at risk that they could again be placed with an inappropriate caretaker.

Since appellant failed to carry her burden of demonstrating the petition was in the minors' best interest, it was not an abuse of discretion for the juvenile court to deny her petition.

II

Appellant contends the juvenile court erred in terminating her parental rights as to E.W. and R.W. because it should have found an exception to adoption based on her beneficial relationships with the minors. We disagree.

"'The permanent plan preferred by the Legislature is adoption. [Citation.]' [Citation.]" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, italics omitted.) If the juvenile court finds by clear and convincing evidence that a minor is likely to be adopted, it must terminate parental rights and order the minor placed for adoption unless the court finds a compelling reason for determining that to do so would be detrimental to the child because of one of the enumerated exceptions. (§ 366.26, subd. (c)(1).)

Section 366.26, subdivision (c)(1)(B)(i), provides an exception to adoption when "[t]he parents have maintained regular visitation and contact with the child and the child

would benefit from continuing the relationship." However, "a parent may not claim entitlement to the exception provided by subdivision (c)(1)[(B)(i)] simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349.) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

The detriment posed to the minors from terminating parental rights must be compelling to warrant a permanent plan other than adoption. (§ 366.26, subd. (c)(1).) Appellant's relationship with the minors was far from perfect. She exposed them to

substantial physical abuse, her visits were inconsistent and at times rare, and she often did not behave like a parent when she did visit. E.W. and R.W. have spent more than half of their lives in foster care. Unsurprisingly, they do not want to live with her.

Appellant fails to show any detriment to E.W. and R.W. from terminating parental rights. It was not an abuse of discretion for the juvenile court to apply the preferred plan of adoption.

III

Appellant claims the juvenile court erred in failing to apply the sibling relationship exception to adoption. Again, we disagree.

Appellant's claim is premised on the statutory exception to adoption contained in section 366.26, subdivision (c)(1)(B)(v). Under that provision, the juvenile court may find a compelling reason for determining that termination of parental rights would be detrimental to the minor where "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

"[E]ven if a sibling relationship exists that is so strong that its severance would cause the child detriment, the court then weighs the benefit to the child of continuing the sibling relationship against the benefit to the child adoption would provide." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952-953 (*L.Y.L.*).)

Appellant's trial counsel argued that terminating parental rights would be detrimental to E.W. and R.W. as their older brother D.T. appeared to be moving towards reunification with appellant. On appeal, appellant reiterates this claim. D.T. had to be placed in a separate foster home because of inappropriate actions between R.W. and him. In spite of their separation from D.T., E.W. and R.W. thrived in foster care and want to be adopted by their foster family.

The authors of the legislation adding the sibling exception envisioned that its applicability would "'likely be rare.'" (*L.Y.L., supra*, 101 Cal.App.4th at p. 950.) This language has been interpreted to mean "that the child's relationship with his or her siblings would rarely be sufficiently strong to outweigh the benefits of adoption." (*Ibid.*) Appellant has not made any showing, let alone the strong showing of detriment needed to apply the sibling exception to adoption.

DISPOSITION

The juvenile court's orders are affirmed.

BLEASE, J.

We concur:

RAYE, P. J.

BUTZ, J.